Exhibit No.	Item	Filing Date
RX 2	Attorney Impink's letter suggesting a post-hearing briefing schedule	01/30/95
cx 19	Attorney Coon's letter requesting on behalf of the parties a short extension of time within which to file their briefs	02/21/95
ALJ EX 19	This Court's Grant Thereof	02/25/95
cx 20	Complainant's brief	03/16/95
RX 3	Respondent's brief	03/16/95

The record was closed on May 16, 1995 as no further documents were filed.

One of the principal issues in this proceeding is a determination as to the proper cost category to which Employment Generalizing Activities ("EGA") should be assigned. To put this issue in proper perspective, it is necessary to refer to the pertinent regulations dealing with EGA and the various cost categories.

Employment Generating Activities ("EGA") are listed as a service under §204 of the Act. There are three cost categories for the assignment of all costs. At least seventy (70) percent of the costs must be spent on training activities, not more than thirty (30) percent can be put toward participant% support and administrative costs, with not more than fifteen (15) percent of the total being classified as administrative. During Program Years 1987 through 1990, the City and County of Denver labeled certain costs as EGA and charged them to both the administrative and participant support cost categories, in compliance with GJTO policy. The OIG and the Grant Officer determined that such categorization was improper, and that all such costs should have been charged as administrative costs. As these administrative costs for the years in question have been used, the Grant Officer now demands that $154,735.00 be repaid by the Complainant.

> Section 108 of the Job Training Partnership Act specifically limits the expenditure of funds available to a service delivery area for the administration of its JTPA title II programs to a maximum of 15%. 29 U.S.C. § 1518. To comply with the limitations on certain costs in the Act, including the limitation on administrative costs, the implementing regulations at 20 C.F.R. § 629.38(a) identify allowable cost categories for title II programs as: training, administration and participant support, and require that costs be allocated to a particular cost category

to the extent that benefits are received by that category.

Summary of the Evidence

Complainant% Version

Thomas A. Lindsley has testified herein by deposition (CX 17) and Mr. Lindsley, who is now Vice-President for Policy and Government Relations with the National Alliance of Business (NAB) in Washington, D.C., testified that NAB is "a private, nonprofit organization that was formed in 1968 by (President) Lyndon Johnson and Henry Ford II. It was an initiative by (President) Lyndon Johnson after the Summit, right in 1968 he pulled a group of corporate leaders and convinced them that business and corporate leaders needed to do more to provide business and training opportunities for disadvantaged (persons) and particularly youth. That was the formation of the voluntary Alliance to work on labor market problems." (CX 17 at 5-9)

Mr. Lindsley further testified that over the years that mission has expanded substantially. It now is a national business organization with membership of about 3,500 members, and the focus is largely on work force quality issues, having to do with national competitiveness, still job and training opportunities for individuals and society, but that it now has a broader mission and includes education, education reform, school-to-work transition, training of incoming workers in the work place, relating to new technologies. Thus, it involves a spectrum of work force quality issues, according to Mr. Lindsley.

Mr. Lindsley also testified that he worked closely with the Labor Department to train and provide information to thousands of business volunteers around the country who were being appointed to state and local councils, private industry councils in particular, to implement a new act called the Job Training Partnership Act that was enacted in 1982.

So for the period of implementation which was roughly two years, he spent a lot of time as an organization providing some assistance and information to the business volunteers in that system. (Id. at 9-10)

The NAB also worked closely with the governors, appropriate state agencies, state advisory councils and key agency heads to draft, prepare and issue technical reports to implement passage of JTPA, as well as the subsequent 1992 Reform Act. Mr. Lindsley who wrote most of the reports until 1990 testified that the purpose of these reports was to "provide access to primary documents that are not easily available to state and local officials who have responsibilities for those programs." Mr. Lindsley also provided "some analysis in a transmittal document

or cover sheet that would be attached to the primary documents that could include anything from new legislation to published regulations from the Federal **Register, to** field memorandum, giving policy guidance from the Labor Department to state officials, and, in some cases, it included original work that we produced that we believed would be valuable to the system in sorting through a lot of the discretionary decisions that they had to make or policy decisions they had to make in designing and implementing programs." **(Id.** at **11-12)**

According to Mr. Lindsley, the technical reports "are started by a perceived need" as a result of a request by state and local officials for information about certain issues. The NAB will then research the issue and "provide the answer from the statute (or) the regulations if it is that self evident, or, if it is an interpretive question-we check with the Labor Department and get back to a lot of the state and local officials." Mr. Lindsley further testified that **"(w)e** make clear that the Alliance is not in a position to make legal rulings or provide legal advice, it is just our analysis, our best analysis of what the statute provides. We then usually have that (analysis) reviewed by other experts and other organizations who are dealing with the same problems to get feedback and editorial comment, and then we issue it under the subscription." (Id. at **13-14)**

Mr. Lindsley identified CX 9 as the 1984 Technical Report "related to employment generating activities under the Job Training Partnership Act," a report issued because the issue of EGA "kept coming up that had implications for accounting procedures and audits." The NAB had been solicited for advice "about the topic of employment generating services" and Mr. Lindsley proceeded to research the issue "and then sent drafts to the Labor Department to be sure it was consistent with their interpretation and that it was something that we could issue without getting anyone in trouble." According to Mr. Lindsley, JTPA "sets up a joint partnership between elected officials and business people to help design and plan the programs" and involves **"a** devolution of authority from the federal government to do all of the direct management and oversight of the program to sending that role to the states," Mr. Lindsley remarking, "The states took on major new responsibilities under this Act that they didn't have under CETA for general oversight of the local program operations, for plan approval of the local agencies that ran the programs and had policy making authority for how the system would be built and shaped and subdivided in that state, so that it could be tailored more specifically to the needs that would help the economy." **(Id.** at **15-21)**

Mr. Lindsley then testified as to the various cost categories under JTPA, centering upon the allocation of the costs of employment generating activities. He discussed this topic with Hugh Davies and Rick Larisch at the Department of Labor

"many times a week" and Mr. Lindsley sent a draft of CX 9 to Mr. Larisch for his review and comments and, according to Mr. Lindsley, "He concurred that it was appropriate to interpret the provisions in the way we had interpreted them, but they were not going to make an official policy issuance on that topic, and that it was really a state and local decision. In his mind the guidance was appropriate." Mr. Lindsley further testified that "in the report, what we were trying to clarify was that employment generating activities could be legitimately charged to any of the 30 percent charged to 30 percent costs some states were reading the definition of support services as very narrow and very exclusive." (Id. at 22-29)

According to Mr. Lindsley, Mr. Larisch "knew we were issuing the paper to what we called the system, which included all of the different levels of state and local officials-trying to implement the program, he knew it was a public document, yes," and Mr. Lindsley could recall no response from Mr. Larisch about that report. (Id. at 30) Mr. Lindsley admitted that he had no authority to bind the NAB to any business agreement to the Department of Labor in 1984 and 1985 and that while the Department may have reviewed CX 9, "there was (no) formal sign off or approval." Mr. Lindsley also admitted that the Department was under no obligation to either approve or disapprove anything in those reports," remarking that he "asked them to review it, and give their best professional advice if this is an appropriate interpretation because it did carry implications (as to) how state and local governments implemented these programs." (Id. at 33-35)

According to page 2 of CX 9, 'The National Alliance of Business is not in a position to make administrative or legal rulings on these issues, but we have made every effort to carefully evaluate the law, regulation and legislative history and to incorporate the comments received on drafts of this report which were reviewed by officials of the Department of Labor and the National Governors Association. (Id. at 36-37)

MS. VICKEY RICKETTS

Ms. Vickey Ricketts, who has served for almost eight years as the Deputy Director of the Governor% Job Training Office and who essentially is the Operations Manager for that office, testified that her office is the state administering agency within Colorado for all of the grants, activities, etc., of JTPA. During the time that Ms. Ricketts had a somewhat similar position in Arizona, she worked closely with the Department of Labor ("Department") in implementing the then recently-passed JTPA and the pertinent regulations. While CETA was basically a federally-operated program, JTPA diminished the federal role and gave the states more authority to run the various programs. (TR 34-38)

Employment Generating Activities ("EGA"), and the proper allocation thereof for accounting purposes, have always been a "cloudy" **or** confusing issue, especially since the Department did **not** provide much guidance in the transition period between CETA and JTPA. When she asked for assistance, she was usually told that the issue, whatever it was, was basically the governor's call. Thus, according to Ms. Ricketts, her office interpreted the regulations as they went along, often relying on advice and guidance provided in documents such as NAB Technical Report **#10,** in evidence as CX 9. The National Governors Association, specifically its JTPA liaison office, was quite active in disseminating information pertinent to JTPA and compliance therewith. (TR 39-43)

Ms. Ricketts agreed that EGA services are not support services as the latter relates to costs incurred for transportation, training, child care, etc. Over the years Ms. Ricketts has met with representatives of the Office of the Inspector General (OIG) and ETA of the Department in an attempt to obtain guidance, Ms. Rickets remarking that this proceeding could have been avoided with proper guidance by the Department and, for instance, with the promulgation of a clear and concise definition of EGA. In the early **1990s,** according to Ms. Ricketts, the OIG, in effect, was creating Department policy (1) through aggressive use of the audit process and (2) by advising ETA that that office was not being forceful enough in enforcing JTPA and the regulations, thereby creating a situation where Colorado was "caught in the middle" with reference to a proper interpretation of various issues. (TR 43-46)

Ms. Ricketts has always acted under the thesis that, in the absence of a specific federal regulation, the Governor has the authority to set policy as long as it does not conflict with the specific provisions of the law and the implementing regulations. The Department routinely reviewed all of Colorado% policies every year or so, including the EGA allocations, and at no point did the ETA local office find fault with what the state did, until the **OIG's** Audit Resolution Report issued on April 4, 1992. **(CX** 11) Ms. Ricketts admitted that ETA, and not the OIG, sets Department policy on a particular issue, that there must be some correlation between the particular cost and the category to which it is assigned, that there was no authority within **§** 108(b)(2)(a) of JTPA for Colorado to allocate EGA expenses to that section's four categories of participant support and that support services are those which directly help support the individual and keep the person in the program. (TR 46-62)

SCOTT **TOLAND**

Scott **Toland,** who has worked for Colorado% GJTO for almost five years and who has a background in fiscal accounting, has duties **(1)** of monitoring subrecipients of JTPA funds to ensure

proper expenditure of funds, (2) of assisting grantees with their responsibilities and (3) of working with the Department and the Grant Officer in carrying out the program. Mr. Toland referred to several letters (CX 7, dated August 27, 1985 and CX 8, dated January 11, 1988) which attempt to clarify those training activities, job costs and the cost principles which he utilized in an attempt to comply with Department regulations. He was the lead person in dealing with the Department after issuance of the Audit Resolution Report which disallowed certain costs as not in compliance with JTPA and the regulations. Mr. Toland, identifying CX 12 as the September 1, 1992 response by Colorado, testified that the Grant Officer erred in disallowing those costs relating to the EGA costs of the MOET because Mr. Toland's actions were proper under the Governor - Secretary Agreement as there was no written policy against allocating EGA costs to participant support-and as Section 204 permits allocation of such costs to support services. Colorado's policy was delineated in its letter (CX 7) wherein there is an explanation as to how that policy was generated. The Department did not question any of those letters until the summer of 1992 after issuance of the Audit Resolution Report. (TR 92-99)

Mr. Toland was so sure of his position that he conducted a job training survey of a number of states to determine how they allocated EGA costs (CX 16) and Mr. Toland testified that 77% of the states allocated EGA costs to participant services as such allocation was permitted by the pertinent regulations and by the continuing state interpretations. In fact, South Dakota had submitted such a plan to the Secretary of Labor and such plan had been approved. Mr. Toland was also quite concerned that the direct benefit test to determine proper allocation arose well after the Audit Resolution Report and sometimes before the hearing. (However, I note page 18 of Finding C in RX 1 clearly reflects the Grant Officer's basic position herein that EGA costs can be charged to the participant support category only if such costs directly support and benefit the JTPA participants.) Mr. Toland has not seen such policy or interpretation expressed in writing during the late 1980s. (TR 99-125)

STEVE DELCASTILLO

Steve DelCastillo, who worked for Colorado GJTO as Program Administrator from February of 1984 to May of 1986 and who has a Ph.D. in Economics from the University of Colorado, testified that his role was (1) to monitor the state's JTPA program and its compliance with the Act and the regulations and (2) to develop economics programs for the state under the JTPA. Mr. Del Castillo reviewed NAB Technical Report #10, dated July of 1984 (CX 9), to develop a JTPA program for the state and the Service Delivery Areas (SDA). He developed this policy (85-01, CX 7) in an attempt to clarify the proper allocation of EGA costs, a policy he believes to be appropriate based upon the information

then available to him and based upon the essential nature of JTPA as beinga statute providing more flexibility to the states in effectuating the job training programs of JTPA. Mr. DelCastillo recalled sending drafts of that policy (CX 7) to the Department% local office in 1984 and he was invariably told by all those to whom he spoke that the issue was the governor's call. CX 7 is the culmination of his research in this area and he recalled preparing two or three drafts of that policy. CX 7 was not a change of policy for the SDAs as he was trying to be flexible in advising the SDAs that thirty (30) percent of the costs could be allocated to both administration and to participant support, even if there were only indirect benefit. (TR 126-130)

Mr. DelCastillo often worked closely with the Department% local office, and with James McGraw in particular, in an attempt to obtain guidance. Mr. McGraw, who at that-point had worked for the Department for at least 25 years, was even detailed thereafter to assist the State of Colorado as a special assistant in developing its JTPA program. According to Mr. DelCastillo, Mr. McGraw's salary continued to be paid by the Department. Mr. DelCastillo developed and issued the policy reflected in CX 7 as the SDAs had asked for clarification. No one at the Department ever advised him of the direct benefit theory and even the NAB guidelines often talked about both direct and indirect costs as being allocated to support services. While Mr. DelCastillo admitted that Section 108(b)(2)(a) does not specifically permit allocating EGA costs to participant support or to any of those four subcategories and while he admitted that that section can be interpreted to refer only to those already in the program, he testified that his latter answer really depended upon how broadly or restrictive one interprets the concept of 'supportive services." Mr. DelCastillo did not seek guidance from the National Office as he could more easily discuss a matter with the local office and expect a more immediate response, Mr. DelCastillo assuming that local officials would refer the issue to Washington if necessary. Mr. DelCastillo did discuss the issue of the proper allocation of EGA costs with representatives of the NAB and they reached the same conclusions as he did. (TR 130-156)

THOMAS MILLER

Thomas Miller who has served for fifteen years as Manager of Planning and Evaluation for the Mayor% Office of Employment and Training (MOET), heads up the accounting department, program procurement, etc., and he testified that his office, as an SDA, provides training for economically disadvantaged Denver residents. Mr. Miller developed a policy relating to the allocation of EGA costs and the Kinzley-Hughes contract was an attempt via Job Link to link or identify trained workers with employment opportunities. Kinzley-Hughes helped MOET determine the best way to proceed with Job Link and part of the program

involved obtaining Public Service Announcements (PSAs) from local television and radio stations relating to the program. These contracted services are identified on page 18 of RX 1 and involve items such as public relations, media advertising, surveys and research of prospective employers to ascertain job openings, television features highlighting the efforts of successful job applicants and general community relations. Job Link provided a 'one-stop" telephone number for employers to report their job openings and the type of workers, skilled or unskilled, needed. Job Link rewarded and praised employers for hiring trained workers and those employers were solicited to bring into the program other employers. The program involved selecting as the Client of the Year a worker who successfully overcame obstacles and hardships to become gainfully employed. (TR 157-167)

Mr. Miller also discussed the EGA cost issue with Mr. McCraw and others at the local office of the Department and he was always referred to the Governor's GJTO for guidance. Mr. Miller testified that during the audit by the OIG, he and one of the auditors, Al Canzans(?), reviewed CX 7 in an attempt to determine proper allocation of EGA costs and the auditor, when asked by Mr. Miller, responded that he would charge them to support services. Mr. Miller was particularly upset because in March of 1987 a review took place by the General Accounting Office and six months later GAO requested that the Department issue a definition of EGA to resolve a number of matters. However, that answer did not arrive until passage of the 1992 JTPA Reform Act and now EGA Costs cannot be allocated to support services, due to a specific proscription. According to Mr. Miller, the costs disallowed by the Grant Officer have already been spent under FIFO (first in first out) accounting rules and he would have charged EGA costs to administration if he had been told to do so; he could also have decreased other administration costs to stay within the fifteen (15) percent allowance. Since passage of the Reform Act, Mr. Miller has charged the Job Link expenses to training. Page 179 of CX 11, under Finding E, is the April 4, 1992 report dealing with the activities of Job Link and the workers placed in employment during the years 1987, 1988, 1989 and for the first six months of 1990. (TR 167-173)

Mr. Miller initially allocated EGA costs according to the

eyes upon any federal program, especially those with so-called strings, and as the participants were welfare recipients, disadvantaged persons, minorities, as well as unemployed persons in need of retraining. CX 15 was prepared by Mr. Miller to justify what MOET had done, i.e., namely to identify and obtain employment for JTPA trained individuals, the very purpose of JTPA. (TR 173-208)

RESPONDENT'S VERSION

EDWARD J. DONAHUE, JR.

Mr. Donahue, who for the last twelve years has worked as a Compliance Specialist in the Division of Audit Closeout and Appeals Resolution, has been involved in various audit resolutions over the years. He testified that the JTPA regulations require that the state conduct an audit resolution within 180 days after completion of the particular program. The state then sends the report to ETA and, if approved, ETA issues a concurrence letter. However, if there is no agreement, an Initial Determination then issues and the parties have sixty days to resolve the matter. If no agreement is reached, a Final Determination is issued and then the grantee files an appeal with the Office of Administrative Law Judges. Lance Grubb is the Grant Officer and as Mr. Donahue's supervisor) is the only person with signatory authority on the concurrence letters and the determinations. With reference to the relationship between the OIG and the Grant Officer, Mr. Donahue pointed out that the OIG reports not to the ETA but only to the Secretary of Labor and that OIG and ETA have separate missions. OIG looks upon itself as the Department% Auditor and OIG, after completing an audit, makes a report to the Grant Officer. However, the OIG cannot and does not set policy for ETA. (TR 209-216)

Mr. Donahue reviewed the OIG report in a cursory manner and he then sent it to the state and the SDA to give them the chance to resolve the matter voluntarily. Mr. Donahue then reviewed the state% audit report and he then issued the Initial Determination disallowing costs of approximately $900,000.00. The original disallowance of $1.2 million was reduced to approximately $800,000.00. The state then submitted additional documentation in support of certain of the disallowed costs and the disallowed costs were subsequently reduced to the amount of $157,735.00, the amount now involved in this proceeding. Mr. Donahue then gave detailed testimony about the basic differences between administrative costs, training costs and support services, pointing out that these costs are described further in Section 108 of JTPA. For instance, Section 108(b)(2)(a) relates to costs associated with individuals who are already in the JTPA program or who are about to begin the program. Mr. Donahue is not aware of any Department policy, letter or notice permitting Colorado to allocate EGA costs to participant support services. He recalled

that the state submitted documents in an attempt to justify its allocations (CX 10). Mr. Donahue further testified that the agreement between the Department and the NAB dealt solely with hosting meetings, seminars and other supportive functions, that the NAB had no authority to set policy and, in fact, on page 2 of cx 9, the NAB clearly acknowledges that it cannot make a legal or administrative ruling on any issue. Mr. Donahue also gave detailed testimony about the disallowances involved in this proceeding, Mr. Donahue admitting that EGA costs could have been charged to participant support if a direct benefit had been shown to the JTPA participants. However, Mr. Donahue rejected Complainant% indirect benefit thesis as "far fetched" and as based on the anticipation that some of the participants will somehow benefit down the road. (TR 216-226)

According to Mr. Donahue, the four support categories of Section 108(b)(l) constitute an exclusive list and there is no reference or indication to support Complainant% position that it is meant to be an example of the general category types. Moreover, EGA costs and the direct benefit theory are based upon the language of JTPA and the implementing regulations as it is clear that such costs should be allocated to administrative costs except where the costs directly support and benefit the participants. Mr. Donahue testified that EGA costs generally deal with employment generating activities and do not directly benefit or support the participants, Mr. Donahue pointing out that EGA costs could be charged to training in those cases where the costs would enable the enrollee to participate in the training. While the GAO did request in 1989 that ETA issue a guideline on the allocation of EGA costs, Mr. Donahue could not recall whether or not the OIG made a similar request. ETA did not issue an interim guideline as ETA was in the process of preparing amendments to JTPA and these were finally promulgated as the 1992 Reform Act, an act not involved in this proceeding. (CX 1 is the JTPA in effect as of the dates of the audits in question herein.) Furthermore, Mr. Donahue testified that there really was no reason for ETA to issue a guideline in 1989 or at any other time as the Act and the regulations are quite clear as to what costs can be charged to training and to support services. (TR 226-252)

COMPLAINANT'S VERSION ON REBUTTAL

THOMAS MILLER

In December of 1991 Mr. Miller telephoned Mr. Donahue and the latter advised that the Department was looking into the issue of EGA costs and that the GAO had suggested in March of 1989 the issuance of a guideline but that Mr. Donahue had advised Mr. Miller that ETA would not issue an opinion unless the state asks for it, Mr. Miller concluding, "we were set up." Mr. Miller further testified that MOET was audited in 1987 and no one told Colorado or MOET to change any of their practices and that if he had known about ETA's direct benefit theory, he would have developed systems to document every step of the procedure, thereby establishing evidence documenting the direct benefit to and support of the participants. (TR 275-280)

DISCUSSION

The State of Colorado issued policy guidance (See CX-6, CX-7 and CX-8) regarding the appropriate cost categories for allocating costs labeled as "Employment Generating Activities" ("EGA"). These policies were developed pursuant to the Governor-Secretary Agreement.[1] The issue in the preliminary and final audits has consistently been stated by the Grant Officer that these policies, because they provided for the charging of EGA service costs to both the 'Participant Support" and/or the "Administrative" cost categories, were improper, and that all such costs should have been charged as administrative costs. As a result, the Department now demands that $154,735.00 be repaid by the City and County of Denver. According to Complainant, only in the final stages of this matter, and primarily at the hearing, has the Grant Officer attempted to retreat from this untenable position by imposing new requirements for the costs to be chargeable to the "Participant Support" category, and only then in rare and exceptional circumstances.

Complainant submits that this is clearly not a case of malfeasance, misuse of funds or an inappropriate expenditure on the part of the City and County of Denver or the State of Colorado. This is a case where the State did absolutely everything conceivable, with extensive input from the Department, to develop the right policy and ensure its correct application. The working relationship between the Grant Officer and City and State representatives has been nothing less thanprofessional, cordial and constructive throughout the audit resolution process. Nonetheless, this issue has engendered a deep sense of unfair treatment on the part of the City and the State.

According to Complainant, the State of Colorado, resolving this audit issue in favor of MOET, takes the position that-

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[1](RX 1 at 194)

because the regulations only prohibit the charging of EGA expenses to the training cost category, by direct implication, either of the other two cost categories are permissible. Additionally, the State takes the position that the Department should be prohibited under doctrines of laches and estoppel from enforcing a contrary interpretation due to the long history of advice from Departmental officials consistent with the State's interpretation, and the failure of the Department to challenge the State's written policies in this regard, despite the specific audit of those policies.

Complainant rejects the Grant Officer's basic contention that the State and the Mayor's Office of Employment and Training, City and County of Denver have failed to demonstrate that the participants in the JTPA Program directly benefited from the EGA services provider?.. As a result, these particular EGA expenses do not qualify for charging to the participant support category expenses, which is a rare exception to their general policy that all EGA costs must be charged to the administrative cost category. This policy does not appear to have been well reflected in communications and directives from the Department of Labor prior to the final determination and presents some problems of internal logic, according to Complainant. (RX 1)

Colorado submits that DOL should be precluded from requiring repayment of the $154,735 in disallowed administrative costs because it properly determined that its EGA costs could be charged to the participant support cost category, thus negating the need to reclassify EGA costs from the participant support cost category to the administration cost category. Colorado contends that, according to 20 C.F.R. § 627.1, the Governor is responsible for deciding what employment generating activities were and where such expenditures could be charged. Colorado further contends that the Governor% policy was consistent with JTPA and its regulations. (See Complainant's Hearing Brief (ALJ 18))

Colorado, in developing its policy, apparently relied on guidance received from the National Governors' Association (NGA) and the National Alliance of Business (NAB) regarding the proper charging of EGA costs. The State submits that this policy of

While the regulation at 20 C.F.R. § 627.1 clearly provides that the Governor has the authority to set policy for the operation of the JTPA program in his or her state, Respondent posits that the Governor must ensure that the state's policy is consistent with JTPA and its regulations, as can be seen in the following section:

> To establish a continuing relationship under the Act, the Governor and the Secretary shall sign a Governor/Secretary Agreement. The agreement shall consist of a statement assuring that the State **shall** comply with (a) the Job Training Partnership Act, as amended, and the applicable rules and regulations and (b) the Wagner-Peyser Act, as amended, and all applicable rules and regulations. The agreement shall specify that guidelines, interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

20 C.F.R. § 627.1. Thus, in order to be in compliance with Section 627.1, the Governor, or his or her designated agent, must assure that any policies issued are consistent with the statutory or regulatory provisions governing the use of federal monies.

The issue in this proceeding involves the use of JTPA funds as EGA and the allocation of such costs among the various cost categories. JTPA provides that grantees may use federal monies to engage in employment generating activities.

> Services which may be made available to youth and adults with funds provided under this title may include, but need not be limited to-
>
> * * *
>
> (19) employment generating activities to increase job opportunities for eligible individuals in the area.

29 U.S.C. § 1604(19).

Respondent points out that Section 204 does not indicate how EGA may be charged against a JTPA award but simply provides for the various services that may be provided using JTPA funding. In order to determine the proper allocation of JTPA funding, Congress drafted a section specifically outlining where particular expenditures are to be allocated. Section 108 establishes three cost categories under JTPA, and identifies to which category expenditures shall be charged. According to Respondent, a review of the statutory language and its

legislative history will demonstrate that Congress did not intend for EGA to be charged to participant support unless there is a direct link between the activity and an actual JTPA participant. Furthermore, the language in Section 108(b)(2)(A) makes it clear that the non-training, non-administration cost category, otherwise known as participant support, is limited to expenditures incurred once an 'individual is enrolled and participating in a training program. The language in Section 204, however, contemplates the development of training programs for unidentified individuals at some point in the future.

Section 108 provides, in pertinent part,:

(a) Not more than 15 percent of the funds available to a service delivery area for any fiscal year for programs under part A of title II may be expended for the cost of administration. For purposes of this paragraph, costs of program support (such as counseling) which are directly related to the provision of education or training and such additional costs as may be attributable to the development of training described in section 204(28) shall not be counted as part of the cost of administration.

(b)(l) Not more than 30 percent of the funds available to a service delivery area for any fiscal year for programs under title II may be expended for administrative costs (as defined under subsection (a)) and costs specified in paragraph (2).

(2)(A) For purposes of paragraph (1), the costs specified in this paragraph are-

(I)50 percent of any work experience expenditures which meet the requirements of paragraph (3);
(ii) 100 percent of any work experience program expenditures which do no meet the requirements of paragraph (3);
(iii) supportive services; and
(iv) needs-based payments described in section 204(27).

financial counseling, and other reasonable expenses required for participation in the training program and may be provided in-kind or through cash assistance.

29 U.S.C. § 1503(24).

Nowhere in Section 108(b)(2)(A) is there an indication that Congress intended to permit States to charge expenditures incurred for services, other than those listed in the four subparagraphs, to this cost category. Therefore, contra to Colorado% argument in its Hearing Brief, the maxim, expressio unius personae est **exclusio** alterius, prohibits the State from charging EGA to the participant support cost category, unless it can demonstrate that the activity fits within one or more of the cost subcategories, according to Respondent, (See **ALJ** EX 18 at 2) Had Congress intended_ a different result, it would have reflected its intentions in the statutory language.

Respondent further posits that a review of the legislative history further supports the Grant Officer's position that Congress intended to limit the amount of expenditures incurred for participant support to only those expenditures necessary to enable JTPA eligible individuals to participate in training programs.

> The third principle upon which this legislation is based is that a training program must truly be a training program and not income maintenance. The Comprehensive Employment and Training Act provided not only training but also income to participants in the form of public service employment through the provisions mandating allowances for persons in institutional training and through the work experience program in which persons were paid to perform work, regardless of whether it increased their employability. The new legislation has a single objective. It is to prepare people for employment. The object is not income maintenance and the provisions relating to public service employment and mandatory allowances in the old law have all been repealed. The provisions of the legislation are carefully designed to ensure that at least 70 percent of all the funds expended will go into direct training expenses with the remainder going only for essential administrative support and the kinds of support services without which participants would not be able to take advantage of the training opportunities.

S. Rep. No.97-469, 97th Cong., 2d Sess. 3, reprinted **in** 1922 U.S. **CODE CONG. & ADMIN. NEWS 2639.**

The legislative history clarifies the distinction between administrative costs and costs incurred for participant support.

> Second, the bill places a 15 percent limit on the costs of administration in every service delivery area. By administrative costs the Committee intends to include those costs which are associated with the management of the program. They are the costs which do not directly benefit the participant but are necessary for the effective delivery of services. They are the costs associated with supervision and management, with fiscal and record keeping systems and with evaluation.

S. Rep. No.970469, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2652.

Congress specifically limited the participant cost category to those services that directly benefitted JTPA eligible individuals by enabling them to participate in the program. As the legislative history suggests, other non-training costs, such as EGA and which are incurred in the course of operating job training programs, should be charged to the administration cost category.

Despite Colorado% argument that JTPA permits the allocation of EGA to the participant support cost category, Respondent points out that witnesses presented by the Complainant have admitted that the language in Section 108 does not, in any way, suggest that MOET's EGA costs meet the criteria set forth in subsection (2)(A)(I) through (iv).

> Q. (By Counsel for DOL) Again, I believe the way that paragraph two reads is, 15 percent for administration, the rest of the costs to be charged to one of those four subcategories. My question to you is: Anywhere in those four subcategories does it say that costs can be charged -- that employment generating costs can be charged under any of those four subcategories?
>
> A. (By Ms. Rickets) That's assuming this is all --
>
> Q. (By Counsel for DOL) No. My question is: Where in that provision of that act does it say that?
>
> A. (By Ms. Rickets) It doesn't say that.
>
> Q. (By Counsel for DOL) Okay. Where in the act, or if you may offhand, does it say that employment generating activities can be charged as needs based payments?
>
> A. (By Ms. Rickets) It doesn't.

Q. (By Counsel for DOL) Where in the act does it say the employment generating activities can be charged as supportive services?

A. (By Ms. Rickets) It isn't a supportive services.

(TR at 69-70)

Q. (By Counsel for DOL) If there% anywhere in that series of provisions where it says that employment generating activities could be charged under any of those four subcategories?

A. (By Mr. DelCastillo) No. It doesn't say that.

(TR at 142) When questioned further about whether it was appropriate to charge EGA to the four subcategories under Section 108(b)(2)(A), Mr. DelCastillo admitted that the State or SDA would have to show some direct benefit to JTPA participants as a result of the EGA.

Q. (By DOL Counsel) Right. But based on the discussion we just had about that interpretation of employment generating activities and what you told me about the four subcategories under 108 --

A. (By Mr. DelCastillo) Yes.

Q. (By DOL Counsel) -- the fact is that in order to charge -- let me ask you: Wouldn't it be clear then from just our discussion, then in order to be charged to participant support -- employment generating activities to the participant support cost subcategories, the four, you would have to show some benefit between JTPA participants and the employment generating activity?

A. (By Mr. DelCastillo) Based on what you are saying right now, yes.

Q. (By DOL Counsel) Based on our review of these two --

A. (By Mr. DelCastillo) Yes.

(TR at 148-149)

According to Respondent, it is evident from the language in the policy letters that Mr. DelCastillo drafted, and MOET relied upon, that he recognized that there had to be some benefit between the EGA and JTPA participants before EGA could be charged to participant support cost category.

The first policy statement issued by the State regarding employment generating activities incorporated a statement by NGA, an organization that contracted with DOL to provide technical assistance on the JTPA program, a statement interpreting the statutory and regulatory provisions regarding the allocation of expenditures incurred for EGA. (CX 6) Despite the clear wording of JTPA and its regulations, NGA, which had no authority to set policy for DOL,[2] determined that EGA could be charged to either participant support or administration. (CX 6 at 3) Despite NGA's statement that the statute did not preclude the practice of charging EGA to either administration of participant support, Colorado, in its policy issuance, conceded that EGA does not directly relate to immediate training or employment, and as such, an assessment must be made regarding which cost category to assign the costs based on the nature of the activity.

B. Employment Generating Activities

Employment generating activities do not directly relate to immediate training or employment, but over time create or expand employment opportunities for eligible persons. These activities, especially occurring where few jobs are currently available, create job opportunities over a longer time period. such activities can qualify as employment generating activities, and arechargeable to cost categories as per Section D, below.

* * *

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[2] The State's witness, Vickey Rickets, admitted that NGA had no authority to set policy for DOL.

> Q. (By DOL Counsel) Did either of those groups -- let me rephrase the question. Do you know whether the Department of Labor granted either the National Alliance of Business or the National Governors Association full authority to set policy for the Department of Labor?
>
> A. Oh, absolutely not. They had no authority to set policy.

(TR at 80; See also CX 9 at 2; CX 17 at 14; CX 35)

E. Conclusions

Therefore, when determining the appropriate cost category for a training or employment generating activity, the SDA can proceed through the following steps:

(1) Identify the training or employment generating activity.
(2) Ascertain the benefits to each cost category.
(3) Identify and charge the appropriate cost category.
(4) Document the charges.

(CX 7 at 3-4)

Colorado repeated its instruction in a policy issuance_ released three years later. (CX 8 at 25-26) In the latter issuance, however, Colorado somehow makes an unexplained leap from the clear guidance provided in JTPA. According to Respondent, Colorado begins its discussion about participant support by citing the definition of supportive services found at Section 4(24). It then lists a variety of services that would fall under the participant support cost category as defined in the Act, such as needs-based payments and work experience. Then, while stating forthrightly that EGA does not directly relate to training or employment, Colorado determines that MOET's EGA can be charged to participant support. (CX 8 at 25-26) As was implicit in Mr. DelCastillo's testimony, Colorado% judgment was flawed in light of the unambiguous language in Section 108(b)(2)(A) of JTPA. (TR at 148-149)

The State repeatedly argues that it should not be penalized for its practices because it was not aware of ETA's "policy" regarding how EGA should be charged, and that, despite confusion among the states on this issue, ETA never formally issued any policy guidance on the treatment of EGA. (TR at 50-51) Ms. Rickets testified that the only "official" ETA statement on the question of proper allocation of EGA costs was found in an internal memorandum dated March 29, 1989, from Donald J. Kulick, Administrator, Office of Regional Management, ETA, to Joseph C. Juarez, Regional Administrator, Region V, ETA. (TR at 51; See also CX 10) Ms. Rickets indicated that the State's policy was consistent with the Kulick Memorandum; however, a review of the document supports ETA's position that EGA can be charged to participant support only in those instances where a State or SDA can show a direct benefit to a JTPA participant.

Determinations on the charging of EGA to non-training categories are within the purview of the Governor, pursuant to the provisions of the Governor/Secretary Agreement and 20 C.F.R. § 627.1. It should be noted that the "Participant Support" cost category is not

limited to just the costs of supportive services, but also may include other costs which directly support and benefit JTPA participants, as defined by the Governor.

(CX 10 at 1)

According to Respondent, Colorado, in an effort to support its argument that there was no consistent policy or guidance from ETA regarding the allocation of EGA costs, surveyed the fifty states to determine each state's practice regarding the allocation of EGA among the cost categories. (CX 16) Mr. Toland testified that, of the number of surveys received, 77% of the respondents stated that it was their practice to charge EGA to participant support. (TR at 100) The states' responses, however, indicate that at least 5 of the 17 states that responded charged-EGA to the-participant support cost category only when they could demonstrate that JTPA eligible individuals benefitted from the employment generating activity. For instance, Arizona's Information Memo #ll-87 stated:

> For any costs to be applicable to the Job Training Partnership Act (JTPA), they must meet the test of reasonableness and appropriateness. If this has been met, then it must be determined which cost category (Administration, Training and/or Participant Support) is appropriate for the expenditure.
>
> Costs to Training and Participant Support must meet the tests that they are expenditures which have a direct tangible utility to the participants, and costs to Administration must have some direct benefit to the JTPA program.

(CX 16 (Arizona)')

> Idaho's IDAPA 09.40 provides:
>
> Employment generating activities are those conducted for the purpose of increasing job opportunities for Job Training Partnership Act (JTPA)-eligible individuals in the area. Employment generating activities may be supported with JTPA funds when a link can be demonstrated between the activity and the employment of eligible individuals in the area. The degree of linkage will determine the cost category to which the activity is charged.

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[3] The pages in CX #16 are not numbered, thus for purposes of this discussion, the relevant portions will be referred to by State. The responses to this survey have been compiled in alphabetical order.

Linkages such as first source hiring agreements are sufficient for charging the activity to administration. In order to charge the activity to support services, a Subrecipient must document actual employment to specific individuals.

(CX 16 (Idaho)

Indiana's Operational Directive 110 provides:

Employment generating activities are defined as activities which increase job opportunities for eligible individuals in the area. Included are those activities which promote the establishment of business or otherwise support the preoperational functions of a business: These activities may be charged to either or both the administrative and/or participant support cost category(ies). Employment generating activities charged to participant support will be classified as supportive services. Therefore, employment generating activities so charged must be necessary to enable individuals who could not pay for such services to participate in training programs. To be charged to participant support, employment generating activities must increase training program opportunities for eligible participants during the term of the plan.

CX #16 (Indiana)(emphasis added) Both Connecticut and Kentucky had similar language in their policy issuances on EGA. (CX 16 (Connecticut and Kentucky))

Mr. Toland, in response to a series of questions about these states' policies, admitted that Colorado did not conduct an analysis of direct benefit to JTPA eligible individuals. (TR at 117) The Final Determination, however, questioned Colorado% practices specifically because it could not demonstrate that MOET's EGA activities directly benefitted JTPA participants, and thus could not be charged to the participant support cost category. (RX 1 at 18)

As is clear in both the Kulick Memorandum and Mr. Donahue's testimony, ETA recognized the fact that there may be limited circumstances where a State or SDA could demonstrate a direct link between EGA and a JTPA participant. In those cases it would be appropriate to charge the EGA expenditures to the participant support cost category. Mr. Donahue explained that an example of such an activity would be a business resource center.

A (By Mr. Donahue) Let me point out an exception I can think of. I['ve] seen it in a couple of other cases, a business resource kind of center where a particular organization took funds essentially for employment

generating activities to set up a center where they could establish and bring in new businesses and help new businesses get started. A business start-up kind of center, I guess. Where all of their administrative functions, if you will, might be serviced centrally by central telephone operator, clerks, data processors, maybe accounting even. And the center was set up so that JTPA participants were going to be the individuals who performed those central services to all of these businesses that were being started up. And as those businesses came of age, if you will, got on their feet, got started, they were spun off out of the center to go off and establish themselves on their own and maybe some new businesses would be brought into the center. That's the kind of thing that -- where, to me, participant support is an appropriate place to charge some employment generating activities.

(TR at 224-225) When questioned further about his example, Mr. Donahue elaborated on why costs incurred for that activity could be charged to participant support.

A (By Mr. Donahue) The cost would have to be shown to directly benefit or support JTPA participants and, as in the example I indicated, the participants that are actually brought in to work in the central services area for that business resource type of setting. And the idea also is after they'd work there, sort of in conjunction with spinning off businesses, may even be the opportunity for the individual participants, having gotten their training through the center, to be able to go out and become a clerical or receptionist or accountant with the individual firms.

(TR at 226-227)

Respondent essentially argues that, absent specific documented evidence that a JTPA eligible individual(s) directly benefited from employment generating activities, the Grant Officer properly determined that the expenditures incurred for EGA should be allocated to the administration cost category.

According to Respondent, the Grant Officer's interpretation is consistent with the language of Section 108 and with that section's legislative history. Had Congress intended to permit grantees to charge EGA costs to participant support in instances where there was no direct benefit to JTPA participants, it would have made its intentions clear when it drafted Section 108.

Respondent's basic thesis is that the Complainant has-failed to establish that its EGA costs directly benefitted JTPA participants and that the remaining disallowed costs of

$154,735.00 should be disallowed as MOET did not or could not demonstrate a direct link between its EGA costs and JTPA participants. Respondent points out the summary report relating to the Kinzley-Hughes contract (CX 15) does not mention JTPA and does not refer to training and placing JTPA eligible individuals in employment. There is also no documentation or follow-up activity to determine whether, in fact, JTPA eligible individuals were placed in employment. At the hearing, as already summarized above, Mr. Miller was unable to clarify any of these issues (See, e.g., TR at 197-198) and the Respondent reiterates its position that the questioned costs should be disallowed.

With reference to MOET's EGA costs in publishing a brochure entitled, This is the Time to Hire Again, Got that Sinking Feeling, this brochure was clearly directed to prospective employers and does not mention the JTPA program or the potential employees who could be enrolled and trained with JTPA funding. (TR 200-203, 250)

The State argues that it was not aware that MOET should have maintained and provided documentation to establish a direct link between JTPA participants and EGA costs. However, as previously discussed, the Grant Officer, in his Final Determination, specifically stated that EGA costs could only be charged to the participant support cost category if the State could establish a direct link between such EGA and the JTPA participants. (RX 1 at 18)

While the services provided as a result of the Kinzley-Hughes contract may have, in fact, benefitted JTPA eligible individuals at some point in the future, none of the services provided under the contract even remotely matched the types of services, for enrolled participants, that Congress identified in Section 108(b)(2)(A) of JTPA. As Mr. Donahue testified, the EGA expenditures were more administrative in nature and, thus, should have been charged to the administration cost category. (TR at 246-250)

Respondent points out the costs associated with MOET's EGA were not disallowed. As Mr. Donahue stated, the costs may well have been allowable EGA expenditures. (TR at 245-248) The only issue with respect to the expenditures was which cost category would absorb the EGA costs. As noted above, the Grant Officer determined that the costs should be reclassified as administrative. (RX 1 at 18)

When the Grant Officer reclassified the EGA expenditures to the administration cost category, MOET exceeded its 15% administrative spending cap- The Grant Officer disallowed-the excess expenditures because the State failed to comply with Section 108(a) of JTPA.

Section 164(d) requires that recipients repay to the United States any amount determined to have been misspent under the Act.

> Every recipient shall repay to the United States amounts found not to have been expended in accordance with this Act. The Secretary may offset such amounts against any other amount to which the recipient is or may be entitled under this Act unless he determines that such recipient should be held liable pursuant to subsection (e). No such action shall be taken except after notice and opportunity for a hearing have been given the recipient.

29 U.S.C. § 1574(d). In this instance, the State exceeded its statutorily imposed spending limit for administrative costs and, as such, those costs should be returned to the United States, according to Respondent.

On the other hand, Complainant submits that the regulations issued pursuant to JTPA and the Governor-Secretary Agreement provide that the Governor is to adopt policies such as those at issue, and that such "guidelines, interpretations and definitions, adopted by the Governor shall, to the extent they are consistent with the JTPA and applicable rules and regulations, be accepted by the Secretary." 20 C.F.R. § 627.1. The question, then, is simply whether the policies at issue were consistent with the Act or regulations, according to the Complainant.

According to Complainant, the most thoughtful, incisive, and detailed analysis of this issue is presented in CX 9, the National Alliance of Business Technical Report, and Complainant submits that the fundamental principles of statutory construction lead to the logical conclusion that JTPA and the implementing regulations allowed charging EGA expenses to the participant cost category in the factual scenario presented herein.

On the basis of the totality of this closed record, and having considered the parties' briefs in support of their respective positions, I make the following:

Findings of Fact

1. This case arises under the Job Training Partnership Act (JTPA), 29 U.S.C. § 1501 et seq., and its implementing regulations at 20 C.F.R. Part 629.

2. Pursuant to 29 U.S.C. § 1511(a)(1), the Governor of the State of Colorado, through his designated agent, the Governor% Job Training Office (hereinafter referred to as "GJTO" or "State" or "Colorado"), was required to allocate its JTPA funding among its service delivery areas (SDA). According to the allocation

plan set forth in 29 U.S.C. § 1511(4)(a), GJTO allocated the appropriate share of Title II JTPA funding to the City and County of Denver, Mayor's Office of Employment and Training (MOET).

3. MOET is a service delivery area within the jurisdiction of the State of Colorado, Governor% Job Training Office.

4. Pursuant to Section 204 (19) of the Act, MOET expended a portion of JTPA dollars on employment generating activities (EGA) during programs years (PY) 1987-1990.

5. "Employment Generating Activities" ("EGA") are listed as a service under § 204 of the Act. There are three cost categories for the assignment of all costs. At least seventy (70) percent of the costs must be spent on training activities, not more than thirty (30) percent can be allocated toward participant's support and administrative costs, with not more than fifteen (15) percent of the total being administrative. During Program Years 1987 through 1990, MOET labeled certain costs as EGA and charged them to both the administration and participant support cost categories.

6. During the years at issue, MOET entered into a contract with Kinzley-Hughes, Inc., a private contractor, to provide certain services for the Private Industry Council (PIC) and the Denver Job Link Program. (RX 1 at 18; CX 15)

The services provided under the Kinzley-Hughes contract included:

Public service announcements;

Production of the Job Link newsletter;

Developing and executing a PIC identity program;

Representing the PIC and its services to the public;

Development and implementation of a public service campaign designed to attract employers to the Denver Job Link employment and training system;

Development of an internal PIC newsletter;

Planning and coordination of PIC retreats; and

PIC awards presentations.

(RX 1 at 18);

7. MOET classified the services provided by Kinzley-Hughes as EGA, and charged the expenditures among the costs categories

identified in Section 108 of JTPA, 29 U.S.C. § 1518. (TR at 183-184) Mr. Miller, MOET's Manager for Planning and Evaluation, testified that MOET initially budgeted EGA expenditures so that 20% of the expenditures would fall into the administration cost category, 40% of the expenditures would fall into the participant support cost category and 40% would fall into the training cost category. (TR at 184) Mr. Miller further testified that MOET made its decision to charge EGA in that manner based on State policy directives issued to MOET. (TR at 185-186; RX 1 at 103; see also CX 6, 7, 8) The State policy directives permitted SDA's to charge EGA to either administration or participant support. (CX 6 at 4; CX 7 at 4; CX 8 at 26)

8. The Regional Office of the Inspector General (OIG), Region VI, audited MOET for program years 1987-1990. The scope of the audit included a review of MOET's system for allocating expenditures to the three cost categories specified in JTPA. (RX 1 at 89')

9. In administrative Finding C, the auditors determined that MOET was improperly charging its EGA expenditures to the participant support cost category. (RX 1 at 19) The auditors, relying on Section 108 of the Act and 20 C.F.R. § 629.38(e)(5), determined that EGA could only be charged to the administration cost category. (Id. at 103)

10. In administrative Finding D[5], the auditors recommended that $188,992 in EGA expenditures, incurred as a result of the Kinzley-Hughes contract, be reclassified as charges to the administration cost category. (Id. at 109) During their review of MOET's system for allocating EGA expenditures, the auditors discovered that MOET consistently allocated the EGA expenditures as follows: administration - 15%; participant support - 40 %; and training - 45% regardless of any direct benefit to JTPA participants. (Id. at 106) As was indicated in Finding C, the auditors determined that the services provided by Kinzley-Hughes did not directly benefit JTPA participants as is required by Section 108(b)(l) and (2)(A); therefore, those expenditures should be charged to the administration cost category. (Id.)

11. In questioned cost Finding G, the auditors recommended that the $188,992 associated with Finding D be returned to the Department because, by reclassifying those costs to the

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[4] The audit was not limited to a review of the MOET's practices with respect to charging EGA; however, that is the only issue in dispute in this proceeding.

[5] Findings C and D were administrative in nature and did not question costs associated with the findings. Finding G contains the actual calculations of the costs disallowed.

administration cost category, MOET exceeded the 15% limitation of administrative expenses required in Section 108(a) of JTPA.[6] (RX 1 at 123)

12. The OIG issued an audit report containing its findings on September 27, 1991. The OIG's audit report questioned $1,098,613 in JTPA expenditures. The OIG forwarded the audit report to the Employment and Training Administration (ETA) for resolution.

13. The ETA Grant Officer forwarded the audit report to GJTO on October 7, 1991 with instructions to resolve the findings and submit its audit resolution report to ETA within 180 days.

14. On April 4, 1992, GJTO submitted its audit resolution report and supporting documentation. The GJTO determined that $857,071 of the JTPA expenditures should be allowed and disallowed the remaining $241,542.

15. The Grant Officer did not fully agree with GJTO and, thus, issued an Initial Determination on July 2, 1992, allowing $106,763 of the costs questioned and proposing to disallow $991,850. (RX 1 at 31) The GJTO forwarded additional documentation in support of its original determination.

16. The Grant Officer, after consideration of GJTO's argument and documentation, issued his Final Determination allowing an additional $172,961. The Final Determination disallowed $818,889 and determined that that amount was subject to debt collection.' (RX 1 at 8)

17. In Finding C of the Final Determination, the Grant Officer determined that MOET had improperly charged its EGA expenditures to the participant support cost category. (RX 1 at 15-18) The Grant Officer stated that EGA costs could be charged to the participant support cost category only in instances where the SDA could demonstrate that its EGA directly supported and benefited JTPA participants. (RX 1 at 18) As the Grant Officer determined that MOET had not demonstrated that its EGA had directly benefitted JTPA participants, the administrative finding remained uncorrected.

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[6] The auditors questioned additional expenditures in Finding G; however, the parties' stipulated at the hearing that the issues surrounding the additional questioned costs have been resolved. (TR at 12)

[7] As noted above, the parties have stipulated that the only Findings remaining in dispute are Findings C, D and G. The only dollar amount in dispute is $154,735.

18. In Finding **D of the Final** Determination, the Grant Officer determined that MOET had improperly charged expenditures incurred as a result of the Kinzley-Hughes contract to the participant support category. (RX 1 at 18-19) After his review of the services provided under the Kinzley-Hughes contract, the Grant Officer determined that the contract, and the expenditures incurred under it, did not directly serve any JTPA participants. (RX 1 at 18) The Grant Officer concluded that this administrative finding remained uncorrected.

19. In Finding G of the Final Determination, the Grant Officer disallowed $188,992 in costs associated with Finding D. (RX 1 at 28) The Grant Officer disallowed these costs because, when the auditors reclassified the EGA costs to the administration cost category, MOET exceeded the 15 percent cost limitation for administrative cost in violation of Section 108(a) of JTPA. (RX 1 at 28-29)

20. The State of Colorado appealed the Grant Officer's Final Determination and requested a hearing before the Office of Administrative Law Judges. (RX 1 at 4)

21. After the appeal was filed, the parties began discussions in an attempt to resolve the issues without the need for a formal hearing. GJTO and MOET sent the Grant Officer additional documentation that was sufficient to resolve certain issues not involved in this proceeding. The Grant Officer also determined, from documentation submitted, **that** MOET had adequately demonstrated that $32,428 in costs incurred for the publication of the Job Link Newsletter, discussed in Finding D, could properly be reclassified as training costs and charged to the training cost category.

22. As a result of the parties' discussions, the Grant Officer reduced the disallowances from $818,889 to $307,206. GJTO agreed to repay to DOL $152,471 associated with certain findings in the Final Determination. The remaining $154,735 is still in dispute and is the amount involved in this proceeding.

23. On November 28 and 29, 1994, hearings were held regarding the amount remaining disallowed and subject to debt collection. The parties stipulated, at the hearing, that the only Findings in the Grant Officer's Final Determination remaining in dispute were Findings C, D and G. (TR at 12)

In view of the foregoing Findings of Fact, I now make the following:

CONCLUSIONS OF LAW

1. The issue in this proceeding involves the use of JTPA funds for employment generating activities (EGA) and the allocation of the EGA costs among the various cost categories.

2. JTPA provides that grantees may use federal monies to engage in employment generating activities. (EGA).

> Services which may be made available to youth and adults with funds provided under this title may include, but need not be limited to-
>
> * * *
>
> (19) employment generating activities to increase job opportunities for eligible individuals in the area.

29 U.S.C. § 1604(19).

Section 204 does not indicate how EGA may be charged against a JTPA award, but simply identifies the various services that may be provided using JTPA funding.

3. In order to determine the proper allocation of JTPA funding, Congress drafted a section specifically outlining where particular expenditures are to be allocated.

4. Section 108 establishes the three cost categories under JTPA, and identifies to which category expenditures shall be charged.

> (a) Not more than 15 percent of the funds available to a service delivery area for any fiscal year for programs under part A of title II may be expended for the cost of administration. For purposes of this paragraph, costs of program support (such as counseling) which are directly related to the provision of education or training and such additional costs as may be attributable to the development of training described in section 204(28) shall not be counted as part of the cost of administration.
>
> (b)(l) Not more than 30 percent of the funds available to a service delivery area for any fiscal year for programs under title II may be expended for administrative costs (as defined under subsection (a)) and costs specified -in paragraph (2).
>
> (2)(A) For purposes of paragraph (1), the costs specified in this paragraph are-

(I) 50 percent of any work experience expenditures which meet the requirements of paragraph (3);
(ii) 100 percent of any work experience program expenditures which do no meet the requirements of paragraph (3);
(iii) supportive services; and
(iv) needs-based payments described in section 204(27).

29 U.S.C. § 1518.

5. Supportive services are defined in Section (4)(24) as:

[S]ervices which are necessary to enable an individual eligible for training under this Act, but who cannot afford to pay for such services, to participate in a training program funded under this Act. Such supportive services may include transportation, health care, special services, and materials for the handicapped, child care, meals, temporary shelter, financial counseling, and other reasonable expenses required for participation in the training program and may be provided in-kind or through cash assistance.

29 U.S.C. § 1503(24).

6. Nowhere in Section 108(b)(2)(A) is there any indication that Congress intended to permit States to charge expenditures incurred for services, other than those listed in the four subparagraphs, to this cost category. Thus, I find and conclude that Section 108(b)(2)(A) prohibits the State from charging EGA to the participant support cost category, unless it can demonstrate that the activity fits within one or more of the cost subcategories.

7. The language in Section 108(b)(2)(A) makes it clear that the non-training, non-administration cost category, otherwise known as participant support, is limited to expenditures incurred once an individual is enrolled and participating in a training program.

8. The language in Section 204, however, contemplates the development of training programs for unidentified individuals at some point in the future.

9. A review of the statutory language and its legislative history demonstrates that Congress did not intend for EGA to be charged to participant support unless there is a direct link between the activity and an actual JTPA participant.

The third principle upon which this legislation is based is that a training program must truly be a training program and not income maintenance. The

> Comprehensive Employment and Training Act provided not only training but also income to participants in the form of public service employment through the provisions mandating allowances for persons in institutional training and through the work experience program in which persons were paid to perform work regardless of whether it increased their employability. The new legislation has a single objective. It is to prepare people for employment. The object is not income maintenance and the provisions relating to public service employment and mandatory allowances in the old law have all been repealed. The provisions of the legislation are carefully designed to ensure that at least 70 percent of all the funds expended will go into direct training expenses with the remainder going only for essential administrative support and the kinds of support services without which participants would not be able to take advantage of the training opportunities.

S. Rep. No.97-469, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2639.

10. The legislative history clarifies the distinction between administrative costs and costs incurred for participant support.

> Second, the bill places a 15 percent limit on the costs of administration in every service delivery area. By administrative costs the Committee intends to include those costs which are associated with the management of the program. They are the costs which do not directly benefit the participant but are necessary for the effective delivery of services. They are the costs associated with supervision and management, with fiscal and record keeping systems and with evaluation.

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11. Congress specifically limited the participant cost category to those services that directly benefitted JTPA eligible individuals by enabling them to participate in the program. As the legislative history suggests, other non-training costs, such as EGA, incurred in the course of operating job training programs should be charged to the administration cost category.

12. Despite Colorado's argument that JTPA permits the allocation of EGA to the participant support cost category, its own witnesses admitted that the language in Section 108 does not,

in any way, suggest that MOET's EGA costs meet the criteria set forth in subsection (2)(A)(I) through (iv).

Q. (By Counsel for DOL) Again, I believe the way that paragraph two reads is, 15 percent for administration, the rest of the costs to be charged to one of those four subcategories. My question to you is: Anywhere in those four subcategories does it say that costs can be charged -- that employment generating costs can be charged under any of those four subcategories?

A. (By Ms. Ricketts) That's assuming this is all --

Q. (By Counsel for DOL) No. My question is: Where in that provision of that act does it say that?

A. (By Ms. Ricketts) It doesn't say that.

Q. (By Counsel for DOL) Okay. Where in the act, or if you may offhand, does it say that employment generating activities can be charged as needs based payments?

A. (By Ms. Ricketts) It doesn't.

Q. (By Counsel for DOL) Where in the act does it say the employment generating activities can be charged as supportive services?

A. (By Ms. Ricketts) It isn't a supportive service.

(TR at 69-70)

Q. (By Counsel for DOL) If there's anywhere in that series of provisions where it says that employment generating activities could be charged under any of those four subcategories?

A. (By Mr. DelCastillo) No. It doesn't say that.

(TR at 142)

13. When questioned further about whether it was appropriate to charge EGA to the four subcategories under Section 108(b)(2)(A), Mr. DelCastillo admitted that the State or SDA would have to show some direct benefit to JTPA participants as a result of the EGA.

Q. (By DOL Counsel) Right. But based on the discussion we just had about that interpretation of employment

generating activities and what you told me about the four subcategories under 108 --

A. (By Mr. DelCastillo) Yes.

Q. (By DOL Counsel) -- the fact is that in order to charge -- let me ask you: Wouldn't it be clear then from just our discussion, then in order to be charged participant support -- employment generating activities to the participant support cost subcategories, the four, you would have to show some benefit between JTPA participants and the employment generating activity?

A. (By Mr. DelCastillo) Based on what you are saying right now, yes.

Q. (By DOL Counsel) Based on our review of these two --

A. (By Mr. DelCastillo) Yes.

(TR at 148-149)

14. Colorado relies on policy letters it issued to the SDA's regarding the proper allocation of EGA expenditures to support its argument that the Governor% policies were consistent with JTPA and its regulations. (CX 18 at 1) However, I find and conclude, based upon the language in the policy letters, that the State recognized that there had to be some benefit between the EGA and JTPA participants before EGA could be charged to participant support cost category.

15. The first policy statement issued by the State regarding employment generating activities incorporated a statement by NGA, an organization that contracted with the Department to provide technical assistance on the JTPA program, a statement interpreting the statutory and regulatory provisions regarding the allocation of expenditures incurred as EGA. (CX 6) Despite the clear wording of JTPA and its regulations, NGA, which had no authority to set policy for DOL [8], determined that EGA

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[8] The State's witness, Vickey Rickets, admitted that NGA had no authority to set policy for DOL.

Q. (By DOL Counsel) Did either of those groups -- let me rephrase the question. Do you know whether the Department of Labor granted wither the National Alliance of Business or the National Governors Association full authority to set policy for the Department of Labor?

(continued...)

could be charged to either participant support or administration. (CX 6 at 3) Despite NGA's statement that the statute did not preclude the practice of charging EGA to either administration of participant support, Colorado, in its policy issuance, conceded that EGA does not directly relate to immediate training or employment, and as such, an assessment must be made regarding which cost category to assign the costs based on the nature of the activity.

> B. Employment Generating Activities
>
> Employment generating activities do not directly relate to immediate training or employment, but over time create or expand employment opportunities for eligible persons. These activities, especially occurring where few jobs are currently available, create job opportunities over a longer time period. Such activities can qualify as employment generating activities, and are chargeable to cost categories as per Section D, below.
>
> * * *
>
> E. Conclusions
>
> Therefore, when determining the appropriate cost category for a training or employment generating activity, the SDA can proceed through the following steps:
>
> (1) Identify the training or employment generating activity.
> (2) Ascertain the benefits to each cost category.
> (3) Identify and charge the appropriate cost category.
> (4) Document the charges.

(CX 7 at 3-4 (emphasis added))

16. Colorado repeated its guidance in a policy issuance released three years later. (CX 8 at 25-26) In the later issuance, however, Colorado somehow makes an unexplained leap

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[8](...continued)

> A. Oh, absolutely not. They had no authority to set policy.

(TR at 80; See also CX 9 at 2; CX 17 at 14; CX 35)

from the clear guidance provided in JTPA. Colorado begins its discussion about participant support by citing the definition of supportive services found at Section 4(24). It then lists a variety of services that would fall under the participant support cost category as defined in the Act, such as needs-based payments and work experience. Then, while stating forthrightly that EGA does not directly relate to training or employment, Colorado determines that MOET's EGA costs can be charged to participant support. (CX 8 at 25-26) As was implicit in Mr. DelCastillo's testimony, I find and conclude that Colorado's judgment was flawed in light 'of the unambiguous language in Section 108(b)(2)(A) of JTPA. (TR at 148-149)

17. Colorado further relies on an internal memorandum dated March 29, 1989, from Donald J. Kulick, Administrator, Office of Regional Management, ETA, to Joseph C. Juarez, Regional Administrator, Region V, ETA. (TR at 51; see also CX 10) However, I further find and conclude that a review of that document demonstrates that EGA can be charged to participant support only in instances where a State or SDA can show a direct benefit to a JTPA participant;

> Determinations on the charging of EGA to non-training categories are within the purview of the Governor, pursuant to the provisions of the Governor/Secretary Agreement and 20 C.F.R. § 627.1. It should be noted that the "Participant Support" cost category is not limited to just the costs of supportive services, but also may include other costs which directly support and benefit JTPA participants, as defined by the Governor.

(CX 10 at 1)

18. Colorado submitted, as evidence, a survey it had done of the fifty states to support its argument that there was no consistent policy or guidance from ETA regarding the allocation of EGA costs. Colorado requested that each state explain its practice regarding the allocation of EGA among the cost categories. (CX 16)

19. Mr. Toland, of the GJTO, testified that, of the number of surveys received, 77% of the respondents stated that it was their practice to charge EGA to participant support. (TR at 100)

20. The states' responses, however, indicate that at least 5 of the 17 states that responded charged EGA to the participant support cost category only when they could demonstrate that JTPA eligible individuals bene-fftted.fromthe employment generating activity.

21. Arizona submitted a copy of its Information Memo #11-87 which provides:

> For any costs to be applicable to the Job Training Partnership Act (JTPA), they must meet the test of reasonableness and appropriateness. If this has been met, then it must be determined which cost category (Administration, Training and/or Participant Support) is appropriate for the expenditure.
>
> Costs to Training and Participant Support must meet the tests that they are expenditures which have a direct tangible utility to the participants, and costs to Administration must have some direct benefit to the JTPA program.

(CX 16 (Arizona)[9])

22. Idaho submitted its IDAPA 09.40 which provides:

> Employment generating activities are those conducted for the purpose of increasing job opportunities for Job Training Partnership Act (JTPA)-eligible individuals in the area. Employment generating activities may be supported with JTPA funds when a link can be demonstrated between the activity and the employment of eligible individuals in the area. The degree of linkage will determine the cost category to which the activity is charged.
>
> Linkages such as first source hiring agreements are sufficient for charging the activity to administration. In order to charge the activity to support services, a Subrecipient must document actual employment to specific individuals.

(CX 16 (Idaho) (emphasis added))

23. Indiana submitted its Operational Directive 110 which provides:

> Employment generating activities are defined as activities which increase job opportunities for eligible individuals in the area. Included are those

[9] The pages in CX 16 are not numbered, thus for purposes of this discussion, the relevant portions will be referred to by State. The responses to this survey have been compiled in alphabetical order.

activities which promote the establishment of business or otherwise support the preoperational functions of a business. These activities may be charged to either or 'both the administrative and/or participant support cost category(ies). Employment generating activities charged to participant support will be classified as supportive services. Therefore, employment generating activities so charged must be necessary to enable individuals who could not pay for such services to participate in training programs. To be charged to participant support, employment generating activities must increase training program opportunities for eligible participants during the term of the plan.

(CX 16 (Indiana)

24. Both Connecticut and Kentucky had similar language in their policy issuances on EGA. (CX 16 (Connecticut and Kentucky))

25. Colorado admits that it did not do an analysis of whether the states required SDA's to show a direct benefit between EGA and JTPA eligible participants. (TR at 117) However, Colorado was aware that the Grant Officer questioned Colorado's method of allocating EGA costs to participant support because Colorado could not prove that JTPA participants benefitted directly from MOET's employment generating activities. (RX 1 at 18)

26. The Grant Officer made his decision that MOET's EGA costs did not directly benefit JTPA participants based on the auditors' review of the employment generating activities. (RX 1 at 18-19)

27. As the testimony and evidence demonstrate, MOET either did not or could not demonstrate a direct link between its employment generating activities and JTPA participants.

28. MOET submitted a series of documents in an attempt to explain its employment generating activities. (CX 15) The Grant Officer reviewed the documentation and concluded that it did not adequately demonstrate a direct link between EGA and JTPA participants. (TR at 248-250)

29. Mr. Miller, an employee of MOET, testified that MOET did not maintain documented evidence that the EGA directly benefitted JTPA participants, nor did MOET do any follow-up to determine whether, in fact, JTPA eligible individuals were placed as a result of these discussions.

Q. (By Counsel for DOL) There's no documented proof attached to this document that indicates that as a result of this discussion group there was a specific number of JTPA participants that benefitted from this discussion?

A. (By Mr. Miller) If you're asking me is there any specific documentation, I'd have to say, no. I think that's one of the problems that we have is we didn't know what documentation people tend to want after the fact.

Q. (By Counsel for DOL) Well, even if there isn't documentation, do you think you could tie specifically from these discussions that you have with employers benefits t.O any particular number of people?

A. (By Mr. Miller) I think I can but it's time involved to do that. I would have to go back and see if I could find the actual records of all the employers that came to us, and I'd have to look in to see all the applicants -- all the client's we trained. The day those clients get jobs with those employers, then I would have to call the employer and say, by the way, this is during the time and you think --

Q. (By Counsel for DOL) But you didn't do that kind of follow-up for purposes of the audit resolution?

A. (By Mr Miller) No, I did not.

(TR at 197-198)

30. Mr. Miller further testified that the services provided by Kinzley-Hughes were not the type of services that would fit into the subcategories set forth in Section 108(b)(2)(A).

Q. (By Counsel for DOL) Well, we can talk about direct in terms of Section 108(b)(2)(A) of the Act that we've been talking about all day. The four specific subcategories of costs. And I guess my question is: Through this discussion group can you relate costs back to any of those four specific categories (supportive services, needs based payments, and the two work experience expenditures) based on this discussion group?

A. (By Mr. Miller) Those four? No.

Q. (By Counsel for DOL) Are there any other listed in Section 108 that I'm unaware of? If you need it again, I'll --

A. (By Mr. Miller) No, I think that's --I think what you are saying is correct, but we disagree with [what] that means.

(TR at 198-199)

31. Mr. Miller also testified regarding other EGA costs administered by MOET and indicated that he had documentation to support the thesis that JTPA participants benefitted directly from the EGA. Despite his testimony, however, no such documentation was submitted to the Grant Officer either during the informal resolution period or during the settlement negotiations. (TR at 250)

32. Mr. Miller was unable at the formal hearing before me to identify any documentation that would demonstrate instances where JTPA participants directly benefitted from the EGA. (TR at 200)

33. While the services provided as a result of the Kinzley-Hughes contract may have, in fact, benefitted JTPA eligible individuals at some point in the future, none of the services provided under the contract even remotely matched the types of services, for enrolled participants, that Congress identified in Section 108(b)(2)(A) of JTPA.

34. I further find and conclude that the EGA expenditures were administrative in nature and, thus, should have been charged to the administration cost category. (TR at 246-250)

35. The costs associated with MOET's EGA were not disallowed. (TR at 245-248) The only issue with respect to these

uitures was which cost category would absorb the EGA costs.

16. As the testimony and evidence demonstrate, the
owed costs should be reclassified as administrative. (RX 1
When the costs are reclassified to the administration
ategory, MOET exceeded its 15% administrative spending cap.
.C. § 1518(a).

17. The Grant Officer disallowed the excess expenditures
e the State failed to comply with Section 108(a) of JTPA
requires that administrative costs incurred for a JTPA
m not exceed 15% of the total award. 29 U.S.C. § 1518(a).

18. Section 164(d) requires that recipients repay to the
States any amount determined to have been misspent under
t.

very recipient shall repay to the United States
mounts found not to have been expended in accordance
ith this Act. The Secretary may offset such amounts

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> against any other amount to which the recipient is or may be entitled under this Act unless he determines that such recipient should be held liable pursuant to subsection (e). No such action shall be taken except after notice and opportunity for a hearing have been given the recipient.

29 U.S.C. § 1574(d).

39. I also find and conclude that as MOET exceeded its cap on administrative expenditures, those costs should be returned to the United States.

40. The State did not assert equitable estoppel as an affirmative defense in this proceeding; however, this Administrative Law Judge has instructed the parties to address the question of whether this matter can be successfully prosecuted by Respondent in light of the doctrine of equitable estoppel. (TR at 310)

41. Black's Law Dictionary defines the doctrine of equitable estoppel as:

> The doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The effect of voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct.

BLACK'S LAW DICTIONARY 280 (5th ed. 1983).

42. The Supreme Court has held, in a line of cases dealing with the issue of equitable estoppel against the Government, that the Government cannot be estopped from taking action in the same manner as private litigants.

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Heckler v. Community Health Services, 467 U.S. 51, 60 (1983) (footnote omitted). See also Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 381 n.1 (1947); Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1989). As the Court explains in Heckler, the Government is charged with protection of public

monies, and thus cannot be bound by actions, whether improper or not, of any of its agents.

> **Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.

Heckler, 467 U.S. at 63 (footnote omitted).

43. The statutory language governing the allocation of costs to the three cost categories is clear. Administrative costs are limited to a portion of the State's overall award under Title II. At least 70% of the award must be used for training, 15% can be expended for administration of the program and the remaining 15% of the award can be expended for either of the four subcategories of costs identified in Section 108(b)(2)(A) of JTPA.

44. The regulations clearly provide that EGA cannot be charged to the training cost category. 20 C.F.R. § 629.38(e)(5).

45. As Colorado failed to demonstrate that its EGA qualified under any of the subcategories in Section 108(b)(2)(A), its EGA expenditures should have been charged to the administration cost category.

46. Colorado is responsible for knowing the law and taking actions that are consistent with the provisions of the Act even in instances where either it received improper information or no information at all. Heckler, 467 U.S. at 63.

47. The Court, in Office of Personnel Management v. Richmond, 496 U.S. 414 (1989), held that the purpose of protecting the Government from the unauthorized acts of its agents is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." Id. at 428.

48. Several Courts of Appeals have established specific criteria in order to make this determination. United States v. Winfield, 822 F.2d 1466, 1476 (10th Cir. 1987); Cortese v. United States, 782 F.2d 845, 848 (9th Cir. 1986); Onslow County, N.C. v. U.S. Department of Labor, 744 F.2d 607 (4th Cir. 1985).

49. The Court of Appeals for the Tenth Circuit has held that four requirements must be met before estoppel can be applied against the Government.

> If estoppel were to be applied against the Government, we have specified these requirement: (1) the party to be estopped must know the facts; (2) he must intend that his conduct will be acted upon or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

United States v. Winfield, 822 F.2d 1466, 1476 (10th Cir. 1987) (citation omitted). The Court also held that it had to consider public policy when determining whether the Government may be estopped from taking action.

> We have also said that there is an additional consideration of public policy when a party seeks to estop the Government; if the Government is unable to enforce the law because of estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.

Id. at 1476 (citation omitted).

50. The Court of Appeals for the Ninth Circuit added an additional requirement that must be met before a party can raise estoppel against the Government.

> A party seeking to raise estoppel against the government must establish "affirmative misconduct going beyond mere negligence"; even then, "estoppel will only apply where the government% wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985); Muherjee v. INS, 793 F.2d 1006, 1008-09 (9th Cir. 1986). " A mere failure to inform or assist does not #justify application of equitable estoppel." Lavin v. March, 644 F.2d 1378, 1384 (9th Cir. 1981); Santiago v. INS, 526 F.2d 488, 493 (9th Cir. 1975), cert. denied, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976); see also INS v. Hibi, 414 U.S. 5, 8-9, 94 S.Ct. 19, 21-22, 38 L.Ed.2d 7 (1973)(per curiam).

Wagner v. Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988). The Tenth Circuit recognized this additional, requirement in Penny v. Giuffrida, 897 F.2d 1543, 1546 (1990).

51. Colorado failed to prove that the elements of estoppel against the Government have been met under.either Court's criteria.

52. The first element requires knowledge of the facts. At no point has Colorado alleged that the Grant Officer was aware of either the specific employment generating activities that MOET had engaged in or to which cost category the EGA would be charged. Colorado, alleging that a regional office staff member reviewed the State's policy regarding the proper allocation of EGA costs, submits that the staff person's knowledge should be somehow imputed to the Department. (TR at 135-139) Yet despite its assertion, the Complainant% witness conceded that the regional office staff member had no authority to officially approve the State's policy issuance. (TR at 149-150)

Furthermore, assuming, arguendo, that Mr. McGraw, ETA, Region VIII, Department of Labor had authority to act on behalf of Department of Labor, there is no credible evidence that he had specific knowledge of MOET's employment generating activities.

53. The Grant Officer became aware of MOET's method of allocating costs only after he received the OIG's audit report. The Grant Officer's knowledge, after the fact, does not equate with the type of knowledge required under the Tenth Circuit's test.

54. The second element requires intentional conduct that would cause a party to believe that such conduct was so intended. There is no credible evidence in the record to support the theory that the Department led Colorado or MOET to believe that it intended recipients of JTPA awards to charge EGA expenditures to the participant support cost category in instances where no direct benefit to JTPA participants had or could be established. Section 108(b)(2)(A) of the Act clearly specifies the types of expenditures that are allocable to the participant support cost category.

55. It is undisputed that Mr. McGraw did not have authority to bind the Department by his actions. (TR at 149-150) The law clearly provides that the Government cannot be bound by the unauthorized actions of its agents.

> Because the federal government's "fiscal operations are so various, and its agencies so numerous and scattered." there is always a risk that misinformed agency employees and representatives may err in interpreting statutes and regulations, and even "the utmost vigilance would not. save the public from serious losses." United States v. Kirkpatrick, 22 U.S. (9 Wheat.) 720, 735, 6 L.Ed. 199 (1824); see Philips v. FEMA, 785 F.2d 13, 17 (1st Cir. 1986). Moreover,

> "[t]he government could scarcely function if it were bound by its employees' unauthorized representations." Goldberg v. Weinberger, 546 F.2d 477, 481 (2d Cir. 1976), cert. denied sub nom. Goldberg v. Califano, 431 U.S. 937, 97 S.Ct. 2648, 53 L.Ed.2d 255 (1977).

Wagner v. Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988).

56. The third element that must be established before a claim for estoppel can be entertained requires that the party, in this case Colorado, must be ignorant of the facts. However, Colorado cannot allege that it was unaware of the facts that led to the Grant Officer's decision because the Grant Officer based his decision on the actions of the State and MOET.

57. The statutory language is clear. All expenditures charged to the participant support cost category must fit within one of the four subcategories identified in Section 108(b)(2)(A). As the Supreme Court held, "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." Heckler, 467 U.S. at 63 (footnote omitted).

58. The fourth element necessary for estoppel against the Government requires that the party rely on the actions of the Government's agent to his detriment. Colorado alleges that the Department should be precluded from collecting the disallowed amounts because Colorado reasonably relied on advice given by NAB and NGA, and because its policies were consistently approved by both the National and Regional offices of the Department. (CX 18 at 3)

59. The evidence shows that neither NGA nor NAB had authority to set policy for ETA. (CX 17 at 33-34; CX 9 at 2; CX 6 at 3) Even if Colorado relied on the unauthorized statements in the publications and suffered injury as a result, the Department cannot be estopped from requesting repayment of the JTPA funds improperly spent.

60. Colorado further claims that both National and Regional Office staff approved MOET's practice of charging EGA to the participant support cost category. However, there is no evidence in the record to support Colorado% claim. On the contrary, Complainant's witness testified that they did not seek guidance from the National office, the only office authorized to issue policy guidelines for ETA, at any time during the period in question. (TR at 62)

61. The regional office was in no position to make policy for the Department because that task was strictly reserved for

the national office, and, more specifically, the Office of Employment and Training Programs. (TR at 283) The law clearly recognizes that the Government cannot be bound by the unauthorized statements of its agents. Wagner v. Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988). Therefore, I find and conclude that Colorado% alleged reliance on advice from the regional office regarding EGA is not enough to estop the Government from seeking repayment from Colorado.

62. The Courts of Appeals have also required proof, by the litigant, of affirmative misconduct on the part of the Government before estoppel can run against the Government. Penny v. Giuffrida, 897 F.2d 1543, 1546 (10th Cir, 1990); Wagner v. Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988).

63. Colorado has neither alleged nor proven that any Government employee% action rose to the level of affirmative misconduct required by the Courts. While it is true that the Department never issued a specific, written policy regarding the proper allocation of employment generating activities expenditures, that inaction alone does not constitute affirmative misconduct on the part of the Department. Lavin v. March, 644 F.2d 1378, 1384 (9th Cir. 1981) ("A mere failure to inform or assist does not justify application of equitable estoppel.")

64. The Act and its regulations were sufficiently clear about the types of activities that could be charged among the various cost categories. (TR at 286) The Department's failure to provide further guidance about employment generating activities could not beconstrued as affirmative misconduct on the part of the Department such that the Department should be precluded from collecting the amount disallowed in the Final Determination.

65. Colorado failed to prove any of the elements necessary for equitable estoppel against the Department.

66. Similarly, Colorado failed to prove the elements necessary to estop the Department from recouping the disallowed amount under the equitable doctrine of laches.

67. The doctrine of laches, a corollary of equitable estoppel, is based upon maxim that equity aids the vigilant and not those who sit on their rights. Laches is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity. It has also been defined as the neglect for an unreasonable time under circumstances permitting diligence, to do what in law, should have been done.

Knowledge, unreasonable delay and change of position are essential elements. Laches requires an element of estoppel or neglect which has operated to prejudice the defendant.

BLACK'S LAW DICTIONARY 453 (5th ed. 1983.)

68. The Supreme Court has held that there are two essential elements that must be met before the Court will estop the Government from taking action based on the doctrine of laches.

> Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.

Costello v. United States, 365 U.S. 265, 282 (1960) (citations omitted). The Court, citing Brown v. County of Buena Vista, 95 U.S. 157, 161, explained the purpose of the doctrine of laches, as follows: "The law of laches, like the principle of the limitation of actions was dictated by experience, and is found in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof." Costello, 365 U.S. at 282.

69. According to the Court's holding in Costello, Colorado must prove that the Department% failure to diligently issue policy statements regarding the proper allocation of EGA expenditures had some prejudicial effect on the State and its operations. Based upon the totality of this closed record, I find and conclude that Colorado has not met this burden.

70. Nothing in the JTPA requires the Secretary to promulgate regulations or issue specific guidance relating to the statutory provisions. In fact, according to principles of statutory construction, it is assumed that unambiguous statutory language speaks for itself. 73 Am. Jur. 2d § 309 (1979); 2A Sutherland Stat. Const. § 4601 (1992).

71. Section 169(a) of JTPA gives the Secretary authority to promulgate regulations as he deems necessary.

> The Secretary may, in accordance with chapter 5 of title 5, United States Code, prescribe rules and regulations (including performance standards) as the Secretary deems necessary. ...

29 U.S.C. § 1579(a). As the Court of Appeals for the Fourth Circuit held in Onslow County , N.C. v. U.S. Department of Labor, 774 F.2d 607 (1985), "[t]he decision of whether to proceed by rulemaking or individual adjudication is left primarily to-agency discretion. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-94, 94 S.Ct. 1757, 1770-72, 40 L.Ed.2d. 134 (1974)." Id. at 610.

72. ETA did not issue policy regarding EGA because Section 108 of JTPA clearly identified what expenditures could be charged to the various cost categories.

73. Section 629.38(e)(5) of the regulations specifically provides that EGA could not be charged to the training cost category; and Section 108(b)(2)(A) listed the four subcategories that constituted the participant support cost category. Thus, I find and conclude that there was no need for the Department to provide additional clarification. (TR at 286)

74. The Governor/Secretary Agreement provided that the Governor would "fully comply with the requirements of JTPA, the Wagner-Peyser Act and all applicable rules and regulations in performing the Governor% duties under these Acts." (RX 1 at 194)

75. This closed record lead to the conclusion that Colorado acted without regard for the clear language of Section 108(b)(2)(A) when it charged its EGA costs to the participant support cost category without proving that such expenditures directly benefitted JTPA participants.

76. Colorado did not meet its burden with respect to the second element that must be met before the defense of laches can be raised. According to Costello, Complainant must demonstrate prejudice resulting from the Department% delay.

77. If any party has been prejudiced as a result of Colorado's activities it was the Department, and ultimately the taxpayers, because the Department has been deprived of the use of $154,735 in federal funds for other federal programs for the last several years.

78. Congress explicitly provided, in JTPA, that the Secretary has a duty to recover funds determined to have been misspent under the Act. 29 U.S.C. § 1574(d). The Grant Officer, as the Secretary's designee, had the responsibility to audit Colorado% activities with respect to JTPA and impose sanctions for noncompliance. Colorado not only was aware of Section 164(d), but agreed to comply with all aspects of JTPA as a condition of receiving federal funds under the Act. (RX 1 at 194) Colorado cannot now claim that, despite the fact that it failed to comply with the law, it would be prejudiced if ordered to repay the amount misspent.

79. The Supreme Court has made it clear that the 'Government can recover monies improperly spent under the law. Bennett v. New Jersey, 470 U.S. 632, 639 (1984). The Court reasoned that the State or other recipient of federal funds agreed to comply with the law as a condition of receiving funds, and that failure

to comply with the law and/or the grant terms created a right of recovery by the Government.

> The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I. 461 U.S., at 790. A State that failed to fulfill its assurances has no right to retain federal funds, and the Federal Government is entitled to recover amounts spent contrary to the terms of the grant agreement. id., at 791; see id., at 794 (WHITE, J., concurring).

Id. at 638-639.

The Court further held that there was "no inequity in requiring repayment of funds that were spent contrary to the assurances provided by the State in obtaining the grants", Bennett v. New Jersey, supra at 632, 645 (1985). Even if Colorado could demonstrate that it had substantially complied with its statutory and regulatory responsibilities, or acted in good faith, "substantial compliance" with the conditions of the grant does not affect the Secretary's right to recoup the misspent funds. Bennett v. Kentucky Department of Education, 470 U.S. 656, 663 (1985). Such issues are not relevant to a "demand for repayment" since it is not a penal sanction, but rather is "in the nature of an effort to collect upon a debt;" therefore, "[t]he issue . . . is not the fairness of imposing punitive measures, but instead whether the Secretary properly determined that [the grantee] failed to fulfill its assurances ...." Id. at 662-663.

80. The Grant Officer determined that Colorado failed to demonstrate that JTPA participants benefitted directly from MOET's employment generating activities. Colorado conceded that it could not and did not prove that MOET's EGA costs were directly linked to JTPA participants. (TR at 197-205) Section 108(b)(2)(A) provides that certain costs can be charged to JTPA only if participants receive either work experience, supportive services or needs-based payments. All other costs must be absorbed by and/or allocated to either training or administration. The regulations do not permit EGA costs to be charged to training. Therefore, I further find and conclude that the disallowed EGA costs must be charged to the administration cost category.

81. Colorado has not demonstrated that it is being prejudiced by the Department% actions when, but for Colorado% action, the sanction would not have been imposed. To hold-to the contrary would violate the express intent of Congress as evidenced in JTPA and the implementing regulations. 29 U.S.C. § 1574(d).

82. In conclusion, I find and conclude that Complainant did not exercise due diligence in its oversight responsibilities of MOET's agreements with its vendors and is not entitled to a waiver of sanctions, pursuant to Section 164(e)(2) of the Act. The state% supervising agency should have been aware of the Department% concern regarding the types of contractual relationships entered into between MOET and its vendors, and should have initiated appropriate action to warn the parties, if not preclude the continuation of these arrangements.

83. In view of the foregoing, I find and conclude that the Respondent has satisfied its burden of proof herein, that Complainant has violated the provisions of JTPA and the implementing regulations, that the Grant Officer's FINAL DETERMINATION shall be affirmed and that the State of Colorado shall be directed to repay, from non-federal funds, the amount of $154,735.00 to the Department of Labor.

Accordingly, I enter the following ORDER:

On September 21, 1992, the Grant Officer issued a Final Determination disallowing $818,889 in costs incurred during the operation of the State of Colorado% job training programs under the Job Training Partnership Act (JTPA), 29 U.S.C. § 1501, et seq.. The parties have narrowed the issues on appeal to Administrative Findings C and D and Questioned Cost Finding G. The amount subject to debt collection in Finding G has been reduced to $154,735.00.

I find and conclude that this closed record supports the Grant Officer's determination that employment generating activities' expenditures incurred by the Mayor's Office of Employment and Training (MOET) were improperly charged to the participant support cost subcategories set forth in Section 108(b)(2)(A) of JTPA, 29 U.S.C. § 1518(b)(2)(A). I further find and conclude that the Grant Officer properly reclassified those expenditures to the administration cost category. As a result of this reclassification of costs, MOET exceeded the 15% cap on administrative costs set forth in Section 108(a), 29 U.S.C. § 1518(a).

Therefore, the decision of the Grant Officer is AFFIRMED and the State of Colorado is ordered to repay to the Department of Labor, from non-federal funds, the amount of $154,735.00.

DAVID W. DI NARDI
Administrative Law Judge

JUN 22 1995
Dated:
Boston, Massachusetts
DWD:dr

SERVICE SHEET

Case Name: **State of Colorado City & County of** Denver

Case No.: 93-JTP-3

Title of Document: DECISION AND ORDER

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